UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/88/D/1187/2003
8 November 2006

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Eighty-eighth session
16 October – 3 November 2006

DECISION

Communication No. 1187/2003

Submitted by:	Frans Verlinden (represented by counsel, B.W.M. Zegers)
Alleged victim:	The author
State Party:	The Netherlands
Date of communication:	12 June 2002 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 16 June 2003 (not issued in document form)
Date of adoption of decision:	31 October 2006

* Made public by decision of the Human Rights Committee.

Subject matter: Alleged bias of judges because of their professional link to colleagues of the lawyer of one of the parties to the proceedings – Right to a reasoned judgment

Substantive issues: Right to a fair trial before an independent and impartial tribunal

Procedural issues: Admissibility *ratione personae* – Level of substantiation of claim – Exhaustion of domestic remedies

Article of the Covenant: 14 (1)

Articles of the Optional Protocol: 1, 2 and 5 (2) (b)

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-eighth session

concerning

Communication No. 1187/2003*

Submitted by:	Frans Verlinden (represented by counsel, B.W.M. Zegers)
Alleged victim:	The author
State Party:	The Netherlands
Date of communication:	12 June 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2006

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication is Frans Verlinden, a Dutch national. He claims to be a victim of a violation by the Netherlands[1] of his rights under article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. B.W.M. Zegers.

1.2 Pursuant to a request submitted by the State party in its observations on admissibility, the Special Rapporteur on New Communications, acting on behalf of the Committee, decided that the admissibility of the communication should be considered separately from the merits.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

[1] The Covenant and the Optional Protocol both entered into force for the Netherlands on 11 March 1979.

Factual background

2.1 The author is the owner of a real estate company. In June 1990, he filed a claim in the Hague Regional Court against a construction company, NBM Amsteland N.V. (NBM), and against the Chairman of its Board of Directors, V.d.B., regarding a property sales contract. On 1 July 1992, the Hague Regional Court issued an interlocutory decision on a procedural question in favour of the author.

2.2 The other party appealed the decision to the Hague Court of Appeal which, on 9 September 1993, quashed the decision and referred the matter back to the Hague Regional Court. The author appealed the decision of the Court of Appeal to the Supreme Court. On 6 January 1995, the Supreme Court dismissed the appeal, referring to Section 101a of the Judicial Organisation Act.[2]

2.3 In renewed proceedings, the Hague Regional Court rejected the author's claim on 29 November 1995. On 4 December 1997, the Hague Court of Appeal dismissed his appeal and, on 5 November 1999, the Supreme Court dismissed the further appeal.

2.4 Throughout the proceedings, NBM and V.d.B. were represented by R.M.S., a lawyer of the law firm De Brauw Blackstone Westbroek Linklaters & Alliance (DBB) in The Hague. Several DBB law firm colleagues of R.M.S. also work as substitute judges at the Hague Regional Court or at the Hague Court of Appeal. Another DBB lawyer is a professor at the Free University in Amsterdam; three other professors at the University are also substitute judges at the Hague Regional Court. One former DBB lawyer became a tenured professional judge at the Hague Court of Appeal; another former DBB lawyer now works as a judge on the Supreme Court and is a relative of the Coordinating President of the Hague Court of Appeal.

2.5 The relevant Hague Courts were composed of full-time judges. No substitute judge heard the author's case.

The complaint

3.1 The author claims that the Dutch system of substitute judges is incompatible with article 14 of the Covenant, since it fails to ensure impartiality of judges. The close link between DBB, in particular the law firm colleagues of R.M.S. who work as substitute judges in the Regional and Appeal Courts of The Hague, and the tenured professional judges in these Courts impairs the independence and impartiality of these tribunals, thereby violating his right to a fair trial under article 14.

3.2 The author submits that articles 3 and 4 of the Civil Courts Composition Act allow judges who regularly sit on a Regional Court to also sit as substitute judges on another Regional Court. The failure of the Hague Court of Appeal to refer his case to another Regional Court, or to

[2] Section 101a (old; currently Section 81) of the Judicial Organisation Act reads: "If the Supreme Court considers that a petition may not lead to cassation of the original judgment or that it does not require that questions of law be answered in the interests of the uniformity or development of the law, it may confine itself to stating this opinion in that part of the judgment containing the grounds on which it is based."

appoint judges of another court as substitute judges in the Hague Courts showed, or at least conveyed the impression, that the Court had an "interest" in passing judgement on his case.

3.3 The author contends that, unlike full-time professional judges who are precluded from acting as a lawyer or notary and from giving professional legal advice, and who are required to include any additional functions in a public register, under article 44 of the Judicial Officers (Legal Status) Act, substitute judges are exempted from the application of this provision. In addition, a report published in 2000 by the Scientific Research and Documentation Centre of the Ministry of Justice concluded that a large number of full-time judges refused to register their additional functions. This lack of transparency made it impossible for a complainant to determine if judges are associated with the other party and undermined the confidence in the integrity of the judiciary.

3.4 Although article 34 of the Code of Conduct for the Legal Profession (1992) prohibits lawyers to act as counsel in proceedings before a judicial body on which one or more of their law firm colleagues sit as judges, it cannot, in the author's view, be excluded that cases where one of the parties is represented by a law firm colleague of a substitute judge are generally being discussed among the judges of a court.

3.5 By reference to article 12 of the Judicial Organisation Act which prohibits contact between a judge and the parties or their lawyers outside court proceedings in respect of pending or future cases, the author claims that the judges of the Hague Courts cannot be considered impartial in his case, given their association with law firm colleagues of the lawyer of the opposite party.

3.6 The author submits that Judge H. of the Hague Court of Appeal is also a legal advisor for the Ministry of Justice, which he considers to be incompatible with the separation of powers principle. He concludes that there are legitimate grounds for fearing that the judges of the Hague Regional and Appeal Courts were not impartial in his case, which was in itself sufficient to vitiate the appearance of independence and impartiality of these tribunals.

3.7 Furthermore, the author claims that his right to a reasoned judgement under article 14 was violated, because the Supreme Court rejected his appeal in 1995 on the basis of Section 101a (now article 81) of the Judicial Organisation Act, by stating only that it would not lead to cassation of the original judgment, nor answer any questions of law in the interest of the uniformity or development of the law.

3.8 The author submits that he exhausted available domestic remedies. He contends that he was unaware of the links between the judges of the Hague Courts and the DBB law firm colleagues of R.M.S., the lawyer of NBM and V.d.B., during the proceedings. Even if he had challenged the judges assigned to his case, they would merely have been replaced by other judges of the same Court, who would have had similar links to the DBB substitute judges.

State party's observations on admissibility

4.1 On 18 August 2003, the State party challenged the admissibility of the communication, arguing that the author does not meet the victim requirement under article 1 of the Optional Protocol; that the same matter is pending before the European Court of Human Rights (article 5,

paragraph 2 (a), of the Optional Protocol); and that the author did not exhaust available domestic remedies (article 5, paragraph 2 (b), of the Optional Protocol).

4.2 The State party points out that none of the judges who heard the author's case was attached to the DBB law firm in The Hague. Judge H., who heard the author's case in 1993 and again in 1997 in the Hague Court of Appeal, was a full-time judge at the Court of Appeal since 1984 when he left the Ministry of Justice. The State party recalls the Committee's jurisprudence[3] that the Optional Protocol does not allow individuals to challenge a State party's law or legal practice in the abstract, by way of *actio popularis*, and concludes that the author has no *locus standi* under article 1 of the Optional Protocol.

4.3 The State party submits that the Registry of the European Court of Human Rights informed it that the author had also brought the same matter before the European Court of Human Rights and that his application (No. 66496/01) was still pending before that Court. Therefore, the Committee should declare the present communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

4.4 The State party argues that the author could have challenged the alleged impartiality of any of the judges involved in his case in civil proceedings under Article 29 (now Article 36) of the Code of Civil Procedure, as soon as the facts or circumstances which could have prejudiced their impartiality had come to his attention, Article 30, paragraph 1 (now Article 37, paragraph 1), of the Code of Civil Procedure. The challenge would subsequently have been heard by the full bench of the Court, excluding the challenged judge (Article 32, paragraph 1 (now Article 39, paragraph 1) of the Code of Criminal Procedure). If granted, the case would have been heard by a court in which the challenged judge took no part.

4.5 For the State party, the author's contention that he was unaware at the time of the "close ties" between the legal profession and the judiciary is unconvincing. Given that additional functions of judges were frequently registered since 1989, following a recommendation of the Netherlands Association for the Administration of Justice, and since 1997 under article 44 of the Judicial Officers (Legal Status) Act, and that the issue of substitute judges had received considerable attention in professional legal literature, it was "extremely improbable" that the author did not learn before the end of the proceedings in his case that the Dutch judiciary sometimes employs persons from the legal profession as substitute judges.

4.6 Any challenge to a judge must be based on specific objections which call into question the judge's impartiality, or the appearance thereof. The State party contests that challenging the impartiality of the judges would not have been an effective remedy. By reference to the Committee's jurisprudence in *Perera v. Australia*,[4] the State party concludes that, in order to exhaust all available domestic remedies, the author would have been required to challenge the judges whom he believed to lack impartiality, and that without such a challenge, his communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

---

[3] Communication No. 35/1978, *Mauritian Women's Case*, Views adopted on 9 April 1981, at para. 9.2.

[4] Communication No. 536/1993, Perera v. Australia, decision on admissibility adopted on 28 March 1995, at para. 6.5.

Author's comments on State party's submission

5.1 On 5 December 2003, the author submitted comments, arguing that the link between the Hague Regional and Appeal Courts and DBB is serious enough to question the independence and impartiality of these tribunals, that his case was no longer pending before the European Court of Human Rights which had declared his application inadmissible on 7 November 2003, and that even if he had known about the link between the Hague Courts and DBB during the proceedings, it would have been futile to challenge the judges.

5.2 The author alleges that there is confusion between the judicial and executive powers since the State party's observations on the admissibility of his communication were signed by H.L.J. for the agent of the Government of the Netherlands, R.B., a civil servant in the Dutch Foreign Ministry and at the same time a substitute judge on the Hague Regional Court. He reiterates that he was personally affected by the lack of independence and impartiality of the Hague courts and therefore a "victim" of a violation of article 14.

5.3 The author submits a letter from the Registry of the European Court of Human Rights informing him that on 7 November 2003, his application (No. 66496/01) was declared inadmissible under Articles 34 and 35 of the European Convention as "essentially the same as one already submitted by the same applicant to another procedure of international investigation or settlement and contained no relevant new information." He argues that the State party's inadmissibility argument based on article 5, paragraph 2 (a), of the Optional Protocol has become moot.

5.4 On exhaustion of domestic remedies, the author reiterates that during the domestic proceedings from 1990 to 1999, he was unaware of the close link between the Hague Courts and DBB; it was only after the end of the domestic proceedings that this claim was brought before the Committee by his new lawyer, Mr. Zegers. The institution of substitute judges was still largely unknown to the public. It was therefore not "extremely improbable" that he learned only recently about the fact that the Dutch judiciary sometimes employs persons from the legal profession as substitute judges. Even if a complainant was aware of such alternative employment, it was difficult to ascertain if lawyers or civil servants were at the same time substitute judges, in the absence of any requirement for substitute judges to register their additional functions.

5.5 The author reiterates that to challenge the judges of the Hague Courts would have been futile, as the decision to appoint judges of another Regional Court to hear a case can only be taken by the Courts *proprio motu*. The dilemma faced by complainants whose case has been re-assigned to different judges of the same court, and to whom the same challenges apply as to the replaced judges, was acknowledged by the Attorney-General in an advisory opinion dated 22 April 2000 in a similar case, *Verlinden v. Pension Fund*. The Attorney-General had concluded that where national law does not provide for a possibility to have one's case heard by another court, such a request could be based on article 6 of the European Convention on Human Rights. Similarly, in *Solleveld v. The Dutch State*, the Hague Regional Court referred the case to the Utrecht Regional Court, after the judges had been challenged because of the alleged link between the Court and the DBB law firm. The request for transfer to another court was granted on the basis of article 6 of the European Convention.

5.6 Furthermore, the author submits that in *Verlinden v. Pension Fund*, Mr. Zegers, who became his lawyer at a late stage of the proceedings, challenged the connection between DBB and the Hague Court of Appeal before that Court and before the Supreme Court. On 30 June 2000, the Supreme Court rejected his complaint and found that there were sufficient guarantees to ensure the independence and impartiality of lawyers working as substitute judges; the connection between the Hague Courts and DBB did not constitute sufficient grounds to justify objective doubts about the Courts' independence and impartiality. On the same day, the Supreme Court made a similar ruling in *Sanders v. ANWB*. The author concludes that in the absence of reasonable prospect of success, he was not required to exhaust domestic remedies by challenging the judges of the Hague Regional Court and the Hague Court of Appeal who heard his case.

Additional observations by the author

6.1 On 28 May 2004, the author submitted a letter dated 8 October 1990 from his former lawyer to the Dean of the Haarlem Bar Association, in which his former lawyer complained about the conduct of R.M.S., who had allegedly boasted about DBB's good contacts with the President of the Almelo Regional Court a few days prior to a hearing before that Court, where each of the lawyers represented one of the parties. At that hearing, the President immediately ruled himself incompetent to hear the case which, in the author's view, was indicative of the contacts used by DBB to obtain "a positive judicial outcome."

6.2 The author contends that Judge H., who heard his case as a judge in the Hague Court of Appeal, used to be a colleague of R.M.S. at the DBB law firm and a colleague of R.M.S.' wife at the Ministry of Justice. In all his court cases, in which R.M.S. acted as counsel of the adversary party, H. was involved as a judge. The fact that Judge T.K. of the Amsterdam Court of Appeal is a member of the Board of Commissioners of NBM also created a conflict of interests.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that the same matter has already been considered by the European Court of Human Rights and concluded by the inadmissibility decision of 7 November 2003. However, it recalls its jurisprudence[5] that it is only where the same matter *is being* examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol. In addition, the State party has not filed a reservation to article 5, paragraph 2 (a), of the Optional Protocol. Thus, article 5, paragraph 2 (a), does not bar the Committee from considering the present communication.

[5] Communication No. 824/1998, *Nicolov v. Bulgaria*, decision on admissibility adopted on 24 March 2000, at para. 8.2; Communication No. 1185/2003, *Van den Hemel v. The Netherlands*, decision on admissibility adopted on 25 July 2005, at para. 6.2; Communication No. 1193/2003, *Sanders v. The Netherlands*, decision on admissibility adopted on 25 July 2005, at para. 6.2.

7.3 While taking note of the State party's argument that the author could have challenged the alleged impartiality of the judges involved in his case in civil proceedings, the Committee also notes the author's uncontested claim that the Supreme Court had rejected a similar challenge made by him in another case, finding that the connection between the Hague Courts and DBB did not give rise to objective doubts about the Courts' independence and impartiality. It recalls that article 5, paragraph 2 (b), of the Optional Protocol does not require authors to exhaust remedies that objectively have no prospect of success,[6] and considers that the author has sufficiently substantiated that it would have been futile for him to challenge the judges involved in his case.

7.4 With regard to the author's claim that the Dutch system of substitute judges is generally incompatible with article 14 of the Covenant, since it fails to ensure impartiality of judges, the Committee observes that this claim amounts to an *actio popularis* and is, therefore, inadmissible under article 1 of the Optional Protocol.

7.5 The Committee has noted the author's claim that he did not have a fair trial because of the close association between the Hague Regional Court and the Hague Court of Appeal on the one hand and the DBB law firm on the other hand, and that therefore article 14 was violated. The Committee observes that the relevant Hague Courts which heard the author's case were composed of full-time professional judges who had no ties with DBB and that the author has not put forward any specific circumstances which would call into question these judges' impartiality and independence. The Committee therefore finds this claim unsubstantiated. As to the claim that the failure of the Hague Court of Appeal to refer the author's case to another Regional Court or to appoint judges from another court would indicate that the Court had a special interest in his case, the Committee considers that the author has not provided the Committee with any additional information which would substantiate his claim. Lastly, the Committee notes the author's claim that there are several special links between the Hague Courts and DBB (see paras. 2.4, 3.6, 5.7 and 5.8 above) which give rise to conflicts of interest. However, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that these links are sufficiently close in time or in nature to the adjudication of his case, as to raise issues under article 14.

7.6 The Committee therefore concludes that the author's claim of lack of independence and impartiality on the part of the judges who heard his case in the Hague Regional Court and the Hague Court of Appeal is inadmissible under article 2 of the Optional Protocol.

7.7 As regards the author's claim that the mere reference to Section 101a of the Judicial Organisation Act, in the Supreme Court's decision of 6 January 1995 rejecting his appeal, violated his right to a reasoned judgment, the Committee observes that, while article 14, paragraph 1, may be interpreted as obliging courts to give reasons for their decisions,[7] it cannot

[6] See, e.g., Communication No. 1095/2002, *Gomaríz Valera v. Spain*, Views adopted on 22 July 2005, at para. 6.4.

[7] The right to a duly reasoned, written judgment in the trial court and at least in the court of first appeal has been recognized by the Committee with regard to article 14, paragraph 5, of the Covenant. See *Van Hulst v. The Netherlands*, Communication No. 903/1999, decision on admissibility adopted on 1 November 2004, at para. 6.4.

be interpreted as requiring a detailed answer to every argument advanced by a complainant.[8] Thus, the need to ensure the effective operation of the judiciary may require courts, especially the highest courts of States parties, merely to endorse the reasons for the lower court's decision in dismissing an appeal, so as to handle their caseload.[9] The Committee recalls that the Supreme Court dismissed the author's appeal, finding that he had failed to adduce any reasons which would lead to cassation of the decision of the Hague Court of Appeal of 9 September 1993. It thereby endorsed, at least implicitly, the reasoning of the Court of Appeal. In addition, the Supreme Court found that the author's appeal did not give rise to any fundamental questions of law, as required by Section 101a of the Judicial Organisation Act. Against this background, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that the Supreme Court's decision was not sufficiently reasoned. This part of the communication is accordingly also inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

---

[8] With regard to article 6 (1) of the European Convention on Human Rights, see European Court of Human Rights, *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, Series A-288, at para. 61; *García Ruiz v. Spain* (Application No. 30544/96), Judgment of 21 January 1999, at para. 26.

[9] *Cf.* European Court of Human Rights, *García Ruiz v. Spain* (Application No. 30544/96), Judgment of 21 January 1999, at para. 26.